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(4)

No. 08-1010



In The

# Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

*Petitioner,*

v.

JEREMY FLAX, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee**

## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

This appeal began with a $105.5 million judgment. Through careful application of this Court's precedents, the trial judge and the Tennessee Supreme Court reduced that award to $5 million in compensatory damages for wrongful death (only $2.5 million against Petitioner) and $13 million in punitive damages. In their *de novo* reviews, the trial court and the Tennessee Supreme Court held that "clear and convincing" evidence left "no serious or substantial doubt" Petitioner knew "the danger its seats [in this family minivan] posed to the public," and to child passengers in particular; "conscious[ly] disregard[ed] . . . the safety of others"; and "deceitfully covered up evidence of the deficiencies of its seat design" that killed Respondents' 8-month-old child. Pet. App. 25a-26a, 32a-33a. Such "reckless" and "reprehensible" misconduct, the Tennessee Supreme Court held, clearly supported the punitive damages award as already remitted under this Court's precedents. *Id.* at 26a, 31a, 36a.

The Questions Presented, properly related, are

1. Whether Petitioner may claim lack of "fair notice" of its potential punitive-damage liability when Petitioner engaged in a "long term pattern" of "reprehensible" misconduct, including having "knowledge of the dangers its seats posed to the public for years" and "deceitfully cover[ing] up evidence of the

## COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

deficiencies of its seat design while simultaneously advertising the Caravan as a vehicle that put children's safety first." *Id.* at 32a-33a.

2. Whether, following faithful and meticulous application below of this Court's relevant precedents and remittance of the award, this Court should review the constitutionality of an unremarkable punitive damage award that is both reasonable and proportionate to the fatal injuries sustained by an 8-month-old child, where the asserted errors consist of no more than insubstantial claims of erroneous factual findings or of misapplication of a properly stated rule of law.

3. Whether this Court should assert jurisdiction, even for purposes of a now-mooted GVR request, to force the court below to "reconsider" a question when the issue was not "considered" below because Petitioner waived it under longstanding Tennessee law.

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## BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Jeremy Flax and Rachel Sparkman, as the natural parents of Joshua Flax, deceased ("Respondents" or "Plaintiffs"), respectfully submit this brief in opposition to the petition for a writ of certiorari.

## JURISDICTION

As discussed more fully in the reasons for denying the writ (*see infra* pp. 26-30), this Court lacks jurisdiction under 28 U.S.C. § 1257(a) as to Question 3 because the federal question Petitioner raises was not presented to the intermediate appellate court, and the Tennessee Supreme Court, in accordance with established practice, refused to consider the issue.

## COUNTERSTATEMENT OF THE CASE

The Petition provides a woefully incomplete account of both the procedural history of this case and the record evidence. On June 30, 2001, Joshua Flax was properly positioned and secured in his forward-facing car seat, directly behind the right front seat of his grandparents' 1998 Dodge Grand Caravan, when the Caravan was rear-ended by defendant Louis Stockell's pick-up truck. Pet. App. 4a-5a. The collision was not severe enough to cause significant injury to any of the five other occupants of the minivan or the

driver of the pickup truck. *Id.* It was sufficient, however, to cause the defective right front seat to collapse rearward, causing the head of its belted occupant to strike Joshua's forehead. *Id.* at 5a. The impact fractured Joshua's skull, producing a "hole in his forehead approximately the size of a golf ball and probably a half inch deep." *Id.* He suffered severe brain damage and died the following day. *Id.*

Both sides acknowledged that "Joshua Flax would not have been seriously injured if the seat in front of him had not yielded rearward." *Id.* Joshua's mother, Rachel Sparkman, seated in the back seat with Joshua, was the first to see his "smashed in" forehead. *Id.*

1. On May 7, 2002, Jeremy Flax and Rachel Sparkman filed this lawsuit against Louis Stockell, the driver of the pick-up that rear-ended the minivan, and Petitioner, the manufacturer of the minivan. *Id.* at 5a-6a. The complaint alleged, *inter alia*, that the minivan's seats were weak, defective, and unreasonably dangerous and that Petitioner failed to warn consumers that the seats posed a danger to children seated behind them. *Id.* at 6a. Plaintiffs jointly sought recovery for Joshua's wrongful death, and plaintiff Rachel Sparkman, individually, sought recovery on her negligent infliction of emotional distress ("NIED") claim for what she experienced from observing the injuries to her 8-month-old son. *Id.* Plaintiffs alleged that Petitioner acted "recklessly" and sought punitive damages on both claims. *Id.*

During the lengthy first phase of the trial, Plaintiffs put on evidence that included internal memoranda of Petitioner and the testimony of its own employees, which demonstrated two decades of conscious indifference to the very dangers of Petitioner's collapsing minivan seat backs revealed in this incident. *Id.* at 20a-28a, 32a. As early as 1980, meeting minutes revealed that seat backs had yielded "in every crash test" but that any improvements were resisted because they would entail additional "'development costs'" and a "'piece penalty.'" *Id.* at 20a. Petitioner's own crash test videos "confirm that in rear-impact collisions the seats yielded into the occupant space behind them." *Id.* Petitioner's internal memoranda showed that the seats were so weak that, in rear crash tests, "the front seats were braced to prevent the seatbacks from impacting [testing] equipment occupying the back seat" where a child would be sitting. *Id.* at 21a. During the "mid-1980s," Petitioner also "began to receive reports of children injured by yielding seatbacks in rear-end collisions," including "skull or facial fractures." *Id.* at 21a.

Alarmed by this knowledge, in the early 1990s, Petitioner formed the Minivan Safety Leadership Team ("MSLT"), chaired by Paul Sheridan, an employee of Petitioner. *Id.* The MSLT sought "to address safety concerns in [Petitioner's] minivans," including specifically "the issue of seat back strength." *Id.* The MSLT studied "complaints regarding injuries caused by yielding seat backs." *Id.* At its March 16, 1993, meeting, the MSLT "reached a consensus that it was

unacceptable for seats to yield rearward into the passenger space behind them and that the seats were *inadequate to protect customers*." *Id.* at 21a-22a (emphasis added). "After the meeting, Mr. Sheridan distributed the minutes of the meeting to various [Petitioner] executives." *Id.* at 22a. Later, Francois Castaing, a Petitioner executive in charge of engineering, ordered Sheridan to "retrieve the minutes of the meeting and destroy them." *Id.* Mr. Sheridan complied with that direction but retained two copies in his office. *Id.*

"In September 1994, Mr. Sheridan told his supervisor that he was going to go to regulators with his concerns about the minivan seatbacks." *Id.* Petitioner's response was to "disband" the MSLT, "fire" Mr. Sheridan, and "confiscate" the MSLT minutes from Mr. Sheridan's office. *Id.* at 22a-23a. As the Tennessee Supreme Court held, Petitioner's "efforts to destroy the recommendations produced by the MSLT are a further indication of [Petitioner's] awareness of the seatback problem and its determination to hide the problem rather than solve it." *Id.* at 23a. In spite of this knowledge, Petitioner "did not issue any warning to customers and continued to advertise the Caravan as a vehicle specifically designed to protect children." *Id.* at 21a.

The jury concluded that the seats were "defective and unreasonably dangerous" and that Petitioner "had consciously disregarded a known, substantial, and unjustifiable risk to [Respondents]" in designing these seats. *Id.* at 25a. The jury awarded compensatory

damages for the wrongful death of Joshua Flax in the amount of $5 million, apportioned evenly between Petitioner and Stockwell. The jury also awarded $2.5 million to Ms. Sparkman for her NIED claim. *Id.* at 7a.

Phase II of the jury trial was devoted solely to the amount of punitive damages, after the jury had determined by clear and convincing evidence in Phase I that Petitioner had acted "recklessly" and that its misconduct warranted punitive damages. *Id.* at 6a-7a. In Phase II, the jury awarded a total of $98 million in punitive damages, divided as $65.5 million for the wrongful death claim and $32.5 million for the NIED claim. *Id.*

In the months following the verdict, the trial judge conducted a *de novo* review of the punitive damages award as required by *Hodges v. S.C. Toof Co.*, 833 S.W.2d 896, 902 (Tenn. 1992), and *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 436 (2001). Pet. App. 7a, 165a-76a (trial court findings of fact and conclusions of law). In an extensive post-trial order, the trial judge concluded that the jury "properly found" that Petitioner "acted recklessly and that punitive damages were warranted." *Id.*

In those independent findings of fact and conclusions of law, the trial judge further found Petitioner "had the weakest seat design strength requirement of all the other manufacturers," as shown by Petitioner's own documents, *id.* at 167a; the "front seat collapsed backward into the back area where a child would be

sitting" in "all of the [Petitioner's] . . . rear impact crash tests," *id.*; Petitioner "had knowledge that these seats were unreasonably dangerous" and knew the "'child could be impacted by that seat,'" *id.* at 167a-68a; "[t]he motivation for [Petitioner's] conduct was to avoid spending the extra money to fix the problem of a weak seat back design," *id.* at 172a; Petitioner's "reckless conduct, concealment of its knowledge, and failure to warn resulted in the injury and death of plaintiffs' only child," *id.* at 171a; and Petitioner's "reprehensible conduct of concealing and not warning customers of the known dangers of putting children behind yielding seats supports a substantial jury award." *Id.* at 171a-72a.

Then, after applying this Court's jurisprudence from *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the trial court determined that the punitive damages exceeded proper proportionality and ordered the award remitted from $98 million to $20 million. Pet. App. 7a, 175a-76a. That remittitur resulted in a final award of $13,367,345 in punitive damages against Petitioner on the wrongful death claim and $6,632,655 in punitive damages on Ms. Sparkman's NIED claim. *Id.* at 7a.

2. On appeal to the Tennessee Court of Appeals, Petitioner challenged the awards of compensatory and punitive damages, but elected not to raise any issue regarding the jury charges governing liability for, or the amount of, punitive damages. *Id.* at 7a-8a,

36a-37a. The court of appeals determined that Ms. Sparkman's individual NIED claim failed to meet the heightened proof requirements for such claims under Tennessee law and vacated the award of both compensatory and punitive damages to Ms. Sparkman individually on the NIED claim. *Id.* at 7a-8a. The court of appeals also held the evidence was insufficient to establish by clear and convincing evidence that Petitioner acted recklessly. *Id.* at 8a. Accordingly, the court of appeals vacated the remaining award of punitive damages on the wrongful death claim as well. *Id.* The court of appeals affirmed the award of $5 million in compensatory damages on the wrongful death claim (only $2.5 million of which was allocated against Petitioner). *Id.*

3. Respondents filed a discretionary application for appeal to the Supreme Court of Tennessee, which was granted. *Id.* Respondents challenged the court of appeals' vacation of the NIED award to Ms. Sparkman and both punitive awards. *Id.* The supreme court affirmed the ruling vacating the NIED damages (and the award of punitive damages appended to that claim). *Id.* at 16a.

However, after *de novo* review of a trial record "consisting of thousands of pages of pleadings, testimony, and exhibits," *id.* at 73a (Wade, J., concurring), the supreme court reversed the court of appeals ruling as to the sufficiency of the evidence of recklessness and reinstated the $13,367,345 in punitive damages on the wrongful death claim. *Id.* at 25a, 36a, 45a-46a. The Tennessee Supreme Court's exhaustive

review of the "wealth of evidence," *id.* at 44a, supporting Respondents' punitive damages claims sustained the conclusion that the "jury's finding of recklessness" was "supported by clear and convincing material evidence" and "that there is no serious or substantial doubt that [Petitioner] consciously disregarded a known, substantial, and unjustifiable risk to the plaintiffs." *Id.* at 25a-26a.

The evidence demonstrated that Petitioner "deceitfully covered up evidence of the deficiencies of its seat design" while advertising to the public the vehicle's safety for children. *Id.* at 32a. Moreover, the evidence showed that Petitioner's "wrongdoing was not an isolated incident because [Petitioner] had knowledge of the danger its seats posed to the public for years and yet continued to sell its vehicles in an unreasonably dangerous condition throughout the State of Tennessee." *Id.* The supreme court further concluded that Petitioner's conduct was "clearly . . . reprehensible" and "evince[d] a conscious disregard for the safety of others." *Id.* at 31a-32a.

Applying this Court's directives in *BMW* and *State Farm*, the supreme court concluded that Petitioner had "fair notice" its reckless conduct could "subject it to a severe penalty." *Id.* at 32a; *see also id.* at 28a-35a & 35a n.8. Analyzing the evidence under the aggravating factors regime articulated in *State Farm*, the court found this case to involve "a tragic experience that is far more serious than a mere economic loss . . . a conscious disregard for the safety of others . . . deceit[ ] . . . [and] not an isolated

incident." *Id.* 31a-32a. Thus, the misconduct was "clearly . . . reprehensible." *Id.* at 31a.

The supreme court then approved a ratio of 1 to 5.35 between the $2.5 million in compensatory damages for which Petitioner was liable based on the jury's 50% allocation of fault to it for wrongful death and the $13,367,345 in punitive damages upheld on that claim. *Id.* at 32a-36a.[1] Finally, the court considered the comparability guidepost, finding no close analogy but using Tenn. Code. Ann. § 40-35-111(c)(4) (2006) as the statute that "most closely expresses" a point of comparison. Pet. App. 33a. The court nonetheless concluded that the other guideposts bear "considerably more weight" and that the fine authorized by statute would be inadequate to punish and deter Petitioner. *Id.* at 36a. On this record, therefore, the Tennessee Supreme Court confirmed the award fell within the constitutionally permissible spectrum of valid awards. *Id.*

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[1] If one compares the total actual harm indisputably *caused* by the failure of Petitioner's defective product (total $5 million wrongful death award) to the punitive damages awarded against Petitioner ($13 million), the real ratio is less than 3 to 1. The ratio is even lower when one considers the potential harm, which would include the obvious emotional distress of a mother seeing her only child's head crushed as well as the impact of the event on the other passengers. *See State Farm*, 538 U.S. at 418 (stating the guidepost considers "the disparity between the *actual* or *potential harm* suffered by the plaintiff and the punitive damages award.") (emphasis added).

In addition, the court declined to consider whether a requested jury instruction constituted error because Petitioner had not raised the issue before the court of appeals. Following longstanding state practice, the supreme court stated that "[l]itigants who hope to have an issue heard by this Court must first present that issue to the intermediate appellate court." *Id.* at 36a-37a (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 281 n.5 (Tenn. 2005); *Va. & Sw. R.R. v. Sutherland*, 197 S.W. 863, 864 (Tenn. 1917)).

## REASONS FOR DENYING THE PETITION

The Petition does not meet any established criteria warranting certiorari. *See* Sup. Ct. R. 10. There is no need to "clarify" (Pet. 9) whether the Due Process Clause's substantive protections against "excessive" or "unreasonable" awards of punitive damages create an absolute bar to the imposition of punitive damages in a products liability action in which a manufacturer has complied with "minimum" federal regulatory standards that lack preemptive effect.[2] This Court's decision in *Silkwood v.*

[2] Since 1974, Federal Motor Vehicle Safety Standard ("FMVSS") 207, 49 C.F.R. § 571.207, has set the bare "minimum" seatback strength that every vehicle manufactured or imported into the U.S. must have just to be sold in this country. *See* 49 U.S.C. § 30102(a)(9) (2009) (FMVSS are "minimum" standards). It requires every seat sold to have at least a "minimum"

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*Kerr-McGee Corp.*, 464 U.S. 238 (1984), forecloses that view, and to date no lower court has adopted Petitioner's sweeping view of Due Process. Moreover, states, including Tennessee, have long exercised their sovereign authority in deciding what particular value to accord a manufacturer's compliance with federal safety standards in products liability actions – with Tennessee and the majority of states deciding that compliance establishes, at most, a rebuttable presumption that a product is not unreasonably dangerous. States have exercised that authority without any intimation from this Court that the Due Process guarantee of "fair notice" *requires* them to accord such compliance an irrebuttable presumption that a design is not defective even where, as here, a manufacturer has actual knowledge that its design is defective, engages in a cover-up of that knowledge, and consciously disregards the risks associated with that design. Petitioner's attempt to locate such a rule within the Due Process Clause is a fanciful exercise

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strength when statically pulled with 20 times the weight of the seat back (or approximately 300 lbs. of force) applied to the mid part of the seat back in a laboratory (which equates to 3,300 inch-pounds of torque). 49 C.F.R. § 571.207. FMVSS 207 does *not* test the performance of a seat in a rear crash and sets no "performance guideline" at all for a seat in a rear or any other kind of crash. *Id.* Similarly, FMVSS 207 did not "set" the "optimum" strength of a seat or "prescribe" any "set" strength other than requiring that all seats exceed a bare "minimum" or "floor." *See id.* In fact, Petitioner's lead seat engineer testified that FMVSS 207 "requires 'inadequate seat strength to insure that the seat does not fail'" in rear impacts. Pet. App. 24a.

that does not merit this Court's serious engagement. *Cf. Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (noting that this Court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

Nor is certiorari warranted to consider whether the evidence in this case supports the award of punitive damages, or whether the Tennessee Supreme Court misapplied this Court's well-established criteria for determining whether an award is constitutionally excessive. The Tennessee Supreme Court faithfully and meticulously applied this Court's precedents to the egregious facts disclosed by this record. Each of the three considerations, articulated by this Court in *BMW* and explained in its progeny, factored into the court's Due Process analysis. The weight the court attributed to these considerations is entirely consistent with this Court's precedents, which mark the reprehensibility factor as the "most important indicium of reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Thus, review of the Tennessee Supreme Court's application of a properly stated rule of law does not warrant certiorari. *See* Sup. Ct. R. 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Finally, certiorari is inappropriate to consider whether the trial court's failure to give a requested jury instruction on harm to non-parties violates

Petitioner's Due Process rights. Petitioner assigned no error to this issue in its first appeal, thereby waiving the issue for all subsequent appeals under adequate and independent state procedure.

## I. THERE IS NO DIVISION OF AUTHORITY REGARDING WHETHER THE DUE PROCESS CLAUSE BARS AN AWARD OF PUNITIVE DAMAGES WHERE A MANUFACTURER HAS COMPLIED WITH "MINIMUM" FEDERAL STANDARDS

The Due Process Clause imposes substantive limits on the broad discretion that States possess with respect to the imposition of punitive damages. *Cooper Indus.*, 532 U.S. at 433. These substantive limits, however, have never been understood to create an absolute bar to the imposition of punitive damages in a products liability action in which a manufacturer has complied with "minimum" federal regulatory standards that nonetheless lack preemptive effect.[3] And no court has subscribed to this suspect view of the Due Process Clause, which Petitioner here advances. (*See* Pet. 13).

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[3] Petitioner does not argue that FMVSS 207, which addresses seatback strength, preempts Respondents' suit for compensatory damages. Nor does it contend that FMVSS 207 somehow preempts punitive damages, but not compensatory damages. *Cf. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2609 (2008).

In fact, Petitioner's theory that "compliance with objective indicators of reasonable conduct, such as industry custom and federal standards . . . precludes punitive damages" as a matter of federal Due Process (Pet. 12) directly conflicts with this Court's decision in *Silkwood*, 464 U.S. 238. There, the Court held that a federal statute did not preclude an Oklahoma court from awarding punitive damages in a case in which the alleged tortfeasors had substantially complied with a federal regulatory scheme. *Id.* at 258. This Court then remanded the case to the Tenth Circuit for consideration of any remaining issues, which included whether substantial compliance with a regulatory scheme bars the award of punitive damages *as a matter of Oklahoma law*, and whether "the amount of the punitive damages award was excessive." *Id.*; *see also Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1457 (10th Cir. 1985) (deciding, on remand, that Oklahoma law does not categorically bar punitive damages based on substantial compliance). This Court's *Silkwood* decision would make no sense were compliance with a regulatory scheme itself dispositive of the Due Process inquiry.

States undoubtedly have the authority to determine what value to accord a manufacturer's compliance with "minimum" federal regulations in products liability actions. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 (1998); *see also, e.g., Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 988 (Ind. 2006) (recognizing state authority "to place some particular value upon compliance with federal safety

standards"). Indeed, this Court has repeatedly recognized that "where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). After all, a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. at 572.

Tennessee's approach cloaks a manufacturer whose conduct complies with federal regulations with a rebuttable presumption that its product is not unreasonably dangerous. *See* Tenn. Code. Ann. § 29-28-104. A plaintiff may overcome this presumption through clear and convincing evidence that the defendant has actual knowledge of the defect and deliberately disregards the foreseeable consequences resulting from the defect. Pet. App. 27a (explaining that § 29-28-104 "was not designed to provide immunity from punitive damages to a manufacturer who is aware that compliance with a regulation is insufficient to protect users of the product. . . . To hold otherwise would create an inflexible rule that would allow some manufacturers knowingly engaged in reprehensible conduct to escape the imposition of punitive damages.").

This framework tracks the laws of several states: compliance with federal regulations or industry custom is strong evidence that a manufacturer is not reckless, but actual knowledge of a defect may

establish reckless conduct warranting punitive damages. *See, e.g., O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438, 1446 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (Kansas law) ("[C]ompliance with the FDA regulations does not preclude punitive damages when there is evidence sufficient to support a finding of reckless indifference to consumer safety."); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 657 (5th Cir. 1981) (Florida law) ("[C]ompliance with [federal Motor Vehicle Safety Act Standards], which were far from comprehensive, [did not] preclude[ ] any finding of recklessness no matter how egregious Honda's conduct had been in ignoring tests that indicated design flaws of a different nature."); *Brown by Brown v. Stone Mfg. Co.*, 660 F. Supp. 454 (S.D. Miss. 1986) (Mississippi law) (compliance with federal flammability standards not conclusive on issue of whether fabric was unreasonably dangerous); *Gen. Motors Corp. v. Moseley*, 447 S.E.2d 302, 311 (Ga. Ct. App. 1994) (rejecting argument that compliance with FMVSS 301 "precludes an award of punitive damages where . . . there is other evidence showing culpable behavior"); *cf. Surles ex rel. Johnson v. Greyhound Lines*, 474 F.3d 288, 300-01 (6th Cir. 2007) (applying Tennessee law and concluding that compliance with federal regulations and common industry practices is evidence of the standard of care but does not conclusively establish the standard of care in negligence cases).[4]

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[4] Petitioner's reliance on *Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007), is misplaced. That case does not stand for the

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When punitive damages are imposed, states like Tennessee require actual knowledge of the harmful effect or a conscious disregard of it. Cases that reflect compliance with a statutory scheme, without more, will not entitle the plaintiff to recover punitive damages. *See* W. PAGE KEETON, ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984). The reason is obvious: actual knowledge or conscious disregard is difficult to establish but clearly can be proven in the appropriate case. *See, e.g., Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1240 (Kan. 1987) ("Far from simply being 'grossly negligent' in marketing the Dalkon Shield, there was substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield for year after year"); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 481 (N.J. 1986) ("[T]he evidence supports a finding that Johns-Manville knew of the dangers created by its product. Not only did it fail to warn users of the serious health hazards associated with exposure to asbestos, it actually took affirmative

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proposition that compliance with government regulations precludes a finding of recklessness because compliance establishes a "reasonable debate" whether a design is in fact defective (Pet. 11). *Safeco* does not speak at all to this issue. *See* 127 S. Ct. at 2216. Nor is *Safeco's* definition of common-law recklessness different from the recklessness standard applied in this case. *Compare id.* at 2215 ("recklessness" equals "action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known'"), *with* Pet. App. 17a ("recklessness" as "consciously disregard[ing] a substantial and unjustifiable risk").

steps to conceal this information from the public"). And where, as here, there is no serious or substantial doubt that the manufacturer had actual knowledge of a defect, deliberately disregarded the foreseeable consequences resulting from the defect, and deceitfully covered up evidence of these deficiencies (*see* Pet. App. 31a-32a), the manufacturer's claim that it did not have fair notice that its conduct could give rise to punitive damages liability cannot be taken seriously.

The cases Petitioner cites do not help its cause.[5] Petitioner's reliance on *Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994), is particularly revealing. Petitioner flatly misrepresents the holding of *Richards* by stating judgment was granted to defendant on punitive damages where "'the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards.'" Pet. 12-13 n.2. In reality, the *Richards* case:

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[5] At most, compliance with applicable safety standards was merely one fact some courts have noted in connection with rejecting a punitive damages claim that was otherwise deficient. *See Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award in light of evidence that "leg guards" on motorcycle were unanimously rejected by industry, scientific community, independent testing and professional organizations, and were unsupported by defendant's testing); *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 826 (Fla. 1986) (vacating punitive award because Chrysler's "test reports" did not support "district court's determination that Chrysler had actual knowledge" that its vehicle was unreasonably dangerous or that it acted with a "wanton disregard for life," but court did not even reach the punitive damages preemption argument).

(1) stated only that "compliance with both federal regulations and industry practices is *some evidence* of due care," 21 F.3d at 1059 (emphasis added); (2) held only that JNOV was appropriate because the plaintiff "failed to demonstrate sufficient evidence on his wanton design claim," *id.*; *but* (3) explicitly rejected the manufacturer's "invitation to hold" that compliance with a federal safety regulation "precludes a finding of wantonness." *Id.* at n.21.

As the Tennessee Supreme Court held, Petitioner's argument that meeting "minimum" standards should immunize a manufacturer from punitive damages would "provide immunity from punitive damages to a manufacturer who is *aware* that compliance with a regulation is *insufficient* to protect users of the product." Pet. App. 27a (emphasis added); *see also id.* at 28a (punitive damages should not be barred when "a manufacturer *knows* that a . . . practice . . . presents a substantial and unjustifiable risk to consumers.") (emphasis added).[6]

This record revealed that Petitioner had the "weakest seat design strength" of all manufacturers

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[6] Petitioner's own engineers and expert witnesses admitted FMVSS 207's "minimum" strength level was "inadequate" and "insufficient." Pet. App. 24a ("seat engineer employed by [Petitioner] testified that FMVSS 207 requires 'inadequate seat strength'"; "[Minivan Safety Leadership Team] agreed that compliance with FMVSS 207 was insufficient to ensure safety of consumers"; "both of [Petitioner's] experts on seat design agreed that compliance with FMVSS 207 alone is inadequate to protect passengers.").

to which Petitioner compared itself; Petitioner's *family* minivan front seats collapsed into the back seat where a child would be sitting in *every* rear crash test Petitioner ran on a minivan for *20 years*; Petitioner even had to brace the front seats in the tests to keep the seats and the dummies in them from collapsing upon and damaging the testing equipment located exactly where a child would be seated in the second row; for *20 years*, Petitioner received complaints of children and adults being injured and killed by collapsing minivan seats; Petitioner's own Minivan Safety Leadership Team studied collapsing minivan seats, determined that the collapsing minivan seat was "unacceptable," and concluded that the minivan seats "were inadequate to protect customers"; Petitioner's response from the highest levels of the corporation to the MSLT's conclusions was to "retrieve and destroy" the minutes of the MSLT, disband the committee, and fire its chairman; Petitioner declined to strengthen the minivan seat because of "cost"; Petitioner "concealed" its knowledge of the risks of death and serious injury from collapsing minivan seats; instead of warning, Petitioner encouraged parents to place their *own children* directly behind seats Petitioner knew would collapse yet "advertise[d] the Caravan as a vehicle that put children's safety first." (*See supra* pp. 3-6).

*Any defendant* pursuing that course of ongoing, deliberate misconduct has more than "fair notice" of the possibility of a substantial punitive damage award: such an award should be *expected*. In view of

this record, Petitioner's "fair notice" claim does not merit exercise of this Court's discretion to review the issue.

## II. THE TENNESSEE SUPREME COURT FAITHFULLY FOLLOWED THIS COURT'S PUNITIVE DAMAGE PRECEDENTS

This Court should decline Petitioner's invitation to review the Tennessee Supreme Court's affirmation of an unremarkable punitive damage award – one that is both reasonable and proportionate to the fatal injuries suffered by a child and the potential injuries to the child's mother, who was one of the plaintiffs in this case. The Tennessee Supreme Court faithfully and meticulously applied this Court's teachings on punitive damages to the egregious facts disclosed by this record. The court separately considered each of the three guideposts set forth in *BMW*, and the weight attributed to these considerations is entirely consistent with this Court's precedents.

Petitioner makes three separate arguments under the umbrella of a meritless claim that the punitive damages are excessive. First, it claims the Tennessee Supreme Court ignored Petitioner's compliance with "minimum" federal regulatory standards. Pet. 16. This argument constitutes little more than a repeat of its first Question Presented in barely different garb. Moreover, as the decision below demonstrates, the supreme court did not ignore but confronted that compliance. The court found that it

could not excuse Petitioner's actual knowledge of its seatbacks' inadequacy or its cover-up of a defect that posed a serious danger to its customers' safety. Pet. App. 27a.

Second, Petitioner elides its own egregious misconduct and the fact that the "*most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW,* 517 U.S. at 575 (emphasis added)). Instead, Petitioner asserts that the Tennessee Supreme Court gave short shrift to the third *BMW* guidepost, comparability, and seeks to establish that guidepost as the most important guidepost as to the reasonableness of a punitive damages verdict.

Petitioner's attempt to elevate the third guidepost into a conclusive and overriding factor when compared to the two others is freighted with mischief. If adopted, it would transform the historically validated test that requires that punitive damages match the gravity of the offense, *see BMW*, 517 U.S. at 575 ("'the enormity of the offense'") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)), into a battle of comparables. Parties would inundate the court with analogous legislative judgments and *presentations of the record* in other punitive cases in order to make meaningful comparisons.

In this case, the supreme court was unable to identify a statutory penalty that would be directly applicable to the long-term pattern of recklessness

and conscious indifference that resulted in the death of a child and that would be comparable to Petitioner's misconduct. Instead, the closest analogous penalty was a fine of only $125,000 that can be imposed on a corporation for a reckless homicide under Tenn. Code. Ann. § 39-13-215. The supreme court did not believe, however, that this criminal statute could reasonably have given Petitioner or any other manufacturer comfort that it would not be subject to a large punitive damages award as a result of reckless conduct shown by the evidence in this case. Rather, the court cited its decision in *Hodges*, 833 S.W.2d at 901-02, which listed the factors governing a punitive damages award which were "sufficient to provide [Petitioner] with notice that consciously disregarding the safety of Tennessee citizens could subject it to a considerably large punitive damage award." Pet. App. 35a & n.8. Nor did the court consider such a miniscule fine effective in punishing or deterring the misconduct at issue. *Id.* at 36a.

Nothing in this Court's jurisprudence recommends taking the highly reprehensible misconduct here, concluding that the award is justified on that basis and is proportionate to the harm done, and then reducing it to the level of an ill-fitted legislative fine or penalty, as Petitioner proposes. The inappropriateness of Petitioner's argument is underscored by the analysis this Court undertook in *State Farm*, where this Court described the misconduct at issue there as low on the reprehensibility scale, identified a $10,000 criminal fine as the most

relevant comparable, and still suggested that the punitive damages should be on the order of $1 million. *State Farm*, 538 U.S. at 419, 429. Critically, this Court noted that a "criminal penalty has less utility" to help "determine the dollar amount of the award" than it has in relating the "seriousness with which a State views the wrongful action." *Id.* at 428. Review of Petitioner's claim on the comparability prong of Due Process analysis is not warranted, and Petitioner's argument lacks merit.

Finally, as part of its excessiveness argument, Petitioner suggests the untenable claim that the 1:1 ratio this Court suggested in *State Farm*, 538 U.S. at 429, comprises a constitutional maximum for every award of $1 million or more. Pet. 25-30. In advancing this unjustified claim, Petitioner manufactures a mathematical bright-line straitjacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together. *See State Farm*, 538 U.S. at 424-25 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. . . . We decline ***again*** to impose a bright-line ratio which a punitive damages award cannot exceed.") (emphasis added; citations omitted). *See also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("*We need not, and indeed we cannot, draw a mathematical bright line* between the

constitutionally acceptable and the constitutionally unacceptable.") (emphasis added).

In fact, the same paragraph in *State Farm* that suggests a single-digit ratio was "perhaps" appropriate when the compensatory award was "substantial" reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

The "facts and circumstances," as the Tennessee Supreme Court found, justify this award. It is further justified because "the monetary value of noneconomic harm might have been difficult to determine." *Id.* (citations omitted). It is well established that wrongful death damages fail to compensate for the harm to the decedent. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998); *see also* WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987) (concluding there is a "systematic underestimation of damages in a wrongful-death case."). Because wrongful death damages largely reflect the financial contribution of the decedent to the family, awards for the death of a child are comparatively low. Polinsky & Shavell, 111 HARV. L. REV. at 941 n.229. Thus, this is "an area of law in which the measurement of loss in pecuniary terms presents intractable difficulties." Dorsey D.

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982).

This Court has mandated a fact-sensitive inquiry for excessiveness. The Tennessee Supreme Court discharged that mandate with utmost care after *de novo* review of this extensive record. As a result, it is utterly improper to examine the few cases with substantial compensatory damage awards as well as punitive damages across the circuits and purport to compare whether they fall uniformly within a 1:1 ratio, as Petitioner suggests. Petitioner's invitation would elevate "ratio" to greater importance than "reprehensibility," which has always been justifiably preeminent in this Court's Due Process jurisprudence.

The fact that this punitive damage award is well within a single-digit ratio, without considering potential harm for which punitive damages were originally awarded but vacated, clearly indicates that the award crosses no impermissible lines. This award warrants no further review.

## III. PETITIONER FAILED TO RAISE THE INSTRUCTIONAL ISSUE ON APPEAL AND WAIVED ANY ERROR

Petitioner admits that it did not argue as error the trial court's failure to give its proposed instruction barring punishment for injuries sustained by non-parties. Pet. 30-31. Petitioner attempts to excuse that neglect by claiming it *did* argue in the court of

appeals error regarding the admission of evidence of harm to non-parties. *Id.* (citing *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)) ("*Williams I*"). Petitioner's third Question Presented seeks a GVR in light of this Court's prospective treatment of *Philip Morris USA v. Williams*, No. 07-1216, 2009 WL 814803 (U.S. Mar. 31, 2009) ("*Williams II*"), which this Court has now reached, dismissing the matter as improvidently granted by per curiam order dated March 31, 2009. As a result, there is no reason to take up Petitioner's now mooted GVR request, and that should end the inquiry on Petitioner's third Question Presented.

Even if this Court had not dismissed *Williams II*, however, there still would have been no basis to take up Petitioner's third question for three essential reasons.

First, Petitioner's current argument is a patently different one from the claim of error concerning jury instructions in *Williams II* and does not cure Petitioner's waiver of its claim of instructional error. Second, the argument Petitioner did put forth in the court of appeals was manifestly incorrect as a matter of law. Finally, at Petitioner's request, Petitioner had the benefit of a conforming procedure that assured the punitive damages do not reflect improper considerations.

In *Williams I*, this Court specifically held that evidence of harm to non-parties was admissible, contrary to the argument Petitioner put forth in the

court of appeals. This Court quoted the Oregon Supreme Court with approval about the relevance of harm to non-parties when it said that the "jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large." 549 U.S. at 356 (quoting *Williams v. Philip Morris, Inc.*, 340 Or. 35, 51, 127 P.3d 1165, 1175 (2006)). After all, "harm to others shows more reprehensible conduct" and remains part of the punitive damage equation. 549 U.S. at 355. Thus, Petitioner's only remotely relevant argument before the court of appeals was patently wrong as a matter of law.

Petitioner's utter neglect of any jury instruction issue at the court of appeals constituted abandonment of Petitioner's claimed *Williams II* issue that it (now mootly) asked this Court to hold for potential GVR treatment. At trial, Petitioner submitted an (albeit erroneous) instruction relating to punishment and the use of evidence of harm to nonparties.[7] Pet. App. 37a. In the intermediate appellate court, however, Petitioner "did not question the rejection of its proposed jury instruction." *Id.* When Petitioner attempted "to resurrect this issue" before the Tennessee Supreme Court, the court ruled that the failure to preserve the issue in Petitioner's appeal to court of appeals operates as a waiver of the claim of error

[7] The instruction adhered to Petitioner's erroneous view that evidence of harm to nonparties was inadmissible in the punitive-damage phase of the case. Resp. App. 17a-18a.

under longstanding state appellate rules. *Id.* (citing *Brown*, 181 S.W.3d at 281 n.5; *Sutherland*, 197 S.W. at 864 ("These are the only errors that were assigned in the Court of Civil Appeals. Others attempted to be assigned here must be overruled")). *See also Alexander v. Armentrout*, 24 S.W.3d 267, 273 (Tenn. 2000) (where "counsel made no argument regarding the Statute of Frauds to the Court of Appeals," the "issue was not properly preserved for appeal, it is waived and will not be considered by this Court.").

That waiver is sufficient to deny the Petition as to the third Question Presented. This Court has repeatedly adhered to its declaration that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *See also Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (Court "generally do[es] not address arguments that were not the basis for the decision below."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (same).

While this limitation on issues eligible for review comprises a prudential consideration, rather than a restriction on jurisdiction, this Court has made plain that it will not depart from that general rule absent a showing of "'unusual circumstances.'" *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted). No unusual circumstances in this case justify an exception to this well established rule. Permitting a party, after a first appeal of right, to "discover" new arguments in order to keep a case alive undermines the orderly administration of

justice, as well as fundamental precepts of fairness. A court properly looks askance at such a request in order to prevent parties from formulating an endless string of new issues for further appellate consideration. The uncompromising approach enunciated by the Tennessee Supreme Court in its repeated decisions on this issue serve as a bulwark against such misuse of the appellate system.

Raising the issue on appeal for the first time in a subsequent discretionary appeal before the Tennessee Supreme Court, which under its rules will not entertain an issue not raised and argued at the prior appellate level, does not constitute presentation and denial by the lower court as is necessary to invoke this Court's jurisdiction. This case presents no warrant to depart from the sound policy of denying certiorari to issues not considered below.

Even without Petitioner's indisputable waiver of the issue, Petitioner is entitled to no relief. Specifically, Petitioner's proposed instruction No. 22 contradicts *Williams I* and is an incorrect statement of law. In that instruction, (Resp. App. 17a-18a), the first sentence stated: "In determining the appropriate *amount of punitive damages*, if any, in this case, you may consider *only the harm to the plaintiff in this case*." (Emphasis added). That instruction was clearly an incorrect statement of law, as *Williams I* itself confirmed. This Court held the jury *could* consider "actual harm to nonparties" in determining the reprehensibility of Petitioner's misconduct, 549 U.S. at 355, and that determination remains the "most

important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Plaintiffs objected to Petitioner's request, and the trial court properly declined to give it. Pet. App. 37a.

Third, Petitioner is entitled to no relief because the trial judge's and supreme court's actions in reviewing and remitting the verdict to ensure no punishment for harm to nonparties are exactly what this Court invited state courts to do in *Williams I*. Specifically, Tennessee's *Hodges* framework for the trial judge's *de novo* review, findings of fact, and conclusions of law reducing and/or approving the award epitomizes the very "procedures" contemplated by *Williams I* to ensure the defendant is not punished "directly on account of harm" to others. *See Williams I*, 549 U.S. at 356 (approving "flexibility" of state to address issue with instructions or "procedures," including contemplating that the state court itself could make "a change in the level of punitive damages"). The trial judge's *Hodges* review resulted in a reduction in the amount of punitive damages from $98 million to $20 million, and the supreme court upheld only $13 million of that amount. The combined actions of the trial judge and supreme court reduced the ratio to less than 3 to 1 of punitive damages total harm caused by Petitioner's conduct, or 5.35 to 1 of punitive damages to Petitioner's allocated share of compensatory damages. Pet. App. 7a. Further, in setting the remitted punitive damages award, the trial judge's order made clear he considered the notice of injuries to nonparties from other similar

product failures solely on the issue of Petitioner's "notice," "knowledge," or "reprehensibility." Pet. App. 167a-68a.; *see also id.* at 170a-71a (considering Petitioner's "aware[ness] that its yielding minivan seats were causing injury and death to children" under *Hodges* subpart 2 – "reprehensibility"). Most important, when selecting the remitted amount of punitive damages, the trial court considered solely the relationship or ratio of the compensatory damages or harm *in this case* to the punitive damages. *Id.* at 175a-76a.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

April 6, 2009

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## APPENDIX A

**Tenn. Code Ann. § 40-35-111**

**Title 40: Criminal Procedure**

**CHAPTER 35 – CRIMINAL SENTENCING REFORM ACT OF 1989**

**Part 1 – General Provisions**

**§ 40-35-111 – Authorized sentences; prison terms or fines; reports**

* * *

(c) A sentence to pay a fine, when imposed on a corporation for an offense defined in title 39 or for any offense defined in any other title for which no special corporate fine is specified, is a sentence to pay an amount, not to exceed:

* * *

(4) One hundred twenty-five thousand dollars ($125,000) for a Class D felony

## APPENDIX B

### 49 C.F.R. § 571.207

### Title 49: Transportation

### PART 571 – FEDERAL MOTOR VEHICLE SAFETY STANDARDS

### Subpart B – Federal Motor Vehicle Safety Standards

### § 571.207 Standard No. 207; Seating systems.

S1. Purpose and scope. This standard establishes requirements for seats, their attachment assemblies, and their installation to minimize the possibility of their failure by forces acting on them as a result of vehicle impact.

S2. Application. This standard applies to passenger cars, multipurpose passenger vehicles, trucks and buses.

S3. Definitions.

Seat adjuster means the part of the seat that provides forward and rearward positioning of the seat bench and back, and/or rotation around a vertical axis, including any fixed portion, such as a seat track. In the case of a seat equipped with seat adjusters at different levels, the term means the uppermost seat adjuster.

S4. Requirements.

S4.1. Driver's seat. Each vehicle shall have an occupant seat for the driver.

<Text of S4.2 intro. par. effective until April 20, 2009.>

S4.2. General performance requirements. When tested in accordance with S5., each occupant seat, other than a side-facing seat or a passenger seat on a bus, shall withstand the following forces, in Newtons.

<Text of S4.2 intro. par. effective April 20, 2009.>

S4.2. General performance requirements. When tested in accordance with S5, each occupant seat shall withstand the following forces, in newtons, except for: a side-facing seat; a passenger seat on a bus other than a school bus; a passenger seat on a school bus with a GVWR greater than 4,536 kilograms (10,000 pounds); and, a passenger seat on a school bus with a GVWR less than or equal to 4,536 kg manufactured before October 21, 2011.

(a) In any position to which it can be adjusted – 20 times the mass of the seat in kilograms multiplied by 9.8 applied in a forward longitudinal direction;

(b) In any position to which it can be adjusted – 20 times the mass of the seat in kilograms multiplied by 9.8 applied in a rearward longitudinal direction;

(c) For a seat belt assembly attached to the seat – the force specified in paragraph (a), if it is a forward facing seat, or paragraph (b), if it is a rearward facing seat, in each case applied simultaneously with the forces imposed on the seat by the seat belt assembly when it is loaded in accordance with S4.2 of § 571.210; and

(d) In its rearmost position – a force that produces a 373 newton meters moment about the seating reference point for each designated seating position that the seat provides, applied to the upper cross-member of the seat back or the upper seat back, in a rearward longitudinal direction for forward-facing seats and in a forward longitudinal direction for rearward-facing seats.

S4.2.1. Seat adjustment. Except for vertical movement of nonlocking suspension type occupant seats in trucks or buses, each seat shall remain in its adjusted position when tested in accordance with the test procedures specified in S5.

S4.3. Restraining device for hinged or folding seats or seat backs. Except for a passenger seat in a bus or a seat having a back that is adjustable only for the comfort of its occupants, a hinged or folding occupant seat or occupant seat back shall –

(a) Be equipped with a self-locking device for restraining the hinged or folding seat or seat back, and

(b) If there are any designated seating positions or auxiliary seating accommodations behind the seat, either immediately to the rear or to the sides, be equipped with a control for releasing that restraining device.

S4.3.1. Accessibility of release control. If there is a designated seating position immediately behind a seat equipped with a restraining device, the control for releasing the device shall be readily accessible to the occupant of the seat equipped with the device and, if access to the control is required in order to exit from the vehicle, to the occupant of the designated seating position immediately behind the seat.

S4.3.2. Performance of restraining device.

S4.3.2.1 Static force.

(a) Once engaged, the restraining device for a forward-facing seat shall not release or fail when a forward longitudinal force, in newtons, equal to 20 times the mass of the hinged or folding portion of the seat in kilograms multiplied by 9.8 is applied through the center of gravity of that portion of the seat.

(b) Once engaged, the restraining device for a rearward-facing seat shall not release or fail when a rearward longitudinal force, in newtons, equal to 8 times the mass of the hinged or folding portion of the seat in kilograms multiplied by 9.8 is applied through the center of gravity of that portion of the seat.

S4.3.2.2. Acceleration. Once engaged, the restraining device shall not release or fail when the device is subjected to an acceleration of 20 g., in the longitudinal direction opposite to that in which the seat folds.

S4.4. Labeling. Seats not designated for occupancy while the vehicle is in motion shall be conspicuously labeled to that effect.

S5. Test procedures.

S5.1. Apply the forces specified in S4.2(a) and S4.2(b) as follows:

S5.1.1. For a seat whose seat back and seat bench are attached to the vehicle by the same attachments.

(a) For a seat whose seat back and seat bench are attached to the vehicle by the same attachments and whose height is adjustable, the loads are applied when the seat is in its highest adjustment position in accordance with the procedure or procedures specified in S5.1.1(a)(1),

S5.1.1(a)(2), or S5.1.1(a)(3), as appropriate.

(1) For a seat whose center of gravity is in a horizontal plane that is above the seat adjuster or that passes through any part of the adjuster, use, at the manufacturer's option, either S5.1.1(b) or, if physically possible, S5.1.1(c).

(2) For a seat specified in S5.1.1(a)(1) for which it is not physically possible to follow the procedure in S5.1.1(c), use S5.1.1(b).

(3) For a seat whose center of gravity is in a horizontal plane that is below the seat adjuster, use S5.1.1(c).

(4) For all other seats whose seat back and seat bench are attached to the vehicle by the same attachments, use S5.1.1(b).

(b) Secure a strut on each side of the seat from a point on the outside of the seat frame in the horizontal plane of the seat's center of gravity to a point on the frame as far forward as possible of the seat anchorages. Between the upper ends of the struts attach a rigid crossmember, in front of the seat back

frame for rearward loading and behind the seat back frame for forward loading. Apply the force specified by S4.2(a) or S4.2(b) horizontally through the rigid cross-member as shown in Figure 1.

(c) Find "$cg_1$," the center of gravity of the portion of the seat that is above the lowest surface of the seat adjuster. On each side of the seat, secure a strut from a point on the outside of the seat frame in the horizontal plane of $cg_1$ to a point on the frame as far forward as possible of the seat adjusted position. Between the upper ends of the struts attach a rigid cross-member, in front of the seat back frame for rearward loading and behind the seat back frame for forward loading. Find "$cg_2$," the center of gravity of the portion of the seat that is below the seat adjuster. Apply a force horizontally through $cg_1$ equal to 20 times the weight of the portion of the seat represented by $cg_1$, and simultaneously apply a force horizontally through $cg_2$ equal to 20 times the weight of the portion of the seat represented by $cg_2$.

S5.1.2 If the seat back and the seat bench are attached to the vehicle by different attachments, attach to each component a fixture capable of transmitting a force to that component. Apply forces,

in newtons, equal to 20 times the mass of the seat back in kilograms multiplied by 9.8 $m/s^2$ horizontally through the center of gravity of the seat back, as shown in Figure 2 and apply forces, in newtons, equal to 20 times the mass of the seat bench in kilograms multiplied by 9.8 $m/s^2$ horizontally through the center of gravity of the seat bench, as shown in Figure 3.

S5.2 Develop the moment specified in S4.2(d) as shown in Figure 4.

S5.3 Apply the forces specified in S4.3.2.1(a) and (b) to a hinged or folding seat as shown in Figure 1 and to a hinged or folding seat back as shown in Figure 5.

S5.4. Determine the center of gravity of a seat or seat component with all cushions and upholstery in place and with the head restraint in its fully extended design position.

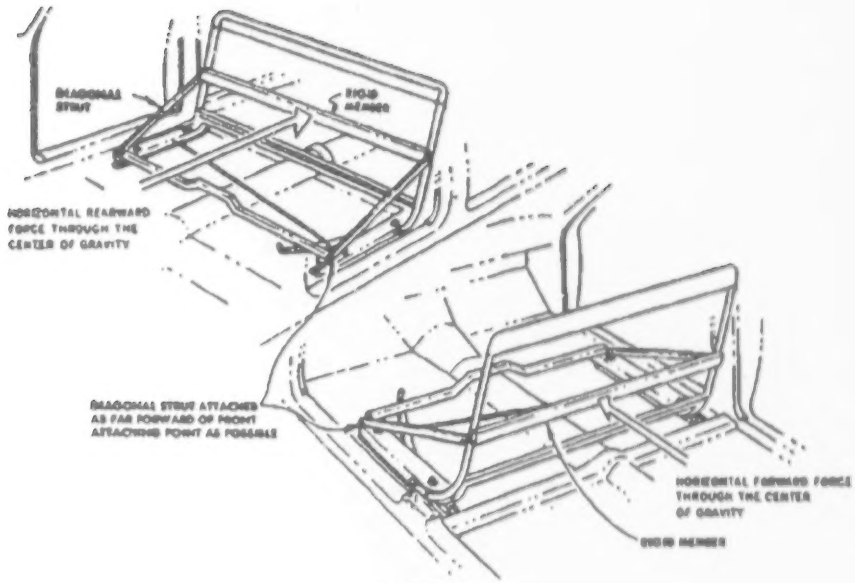


FIGURE 1

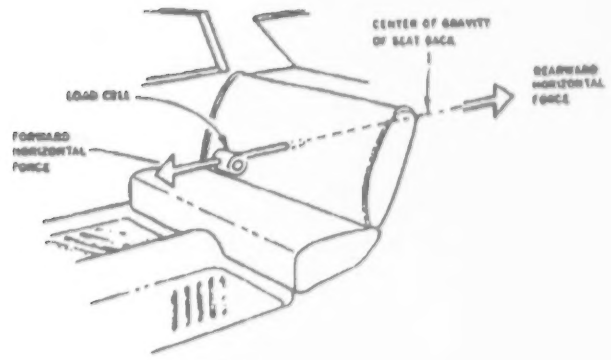


FIGURE 2

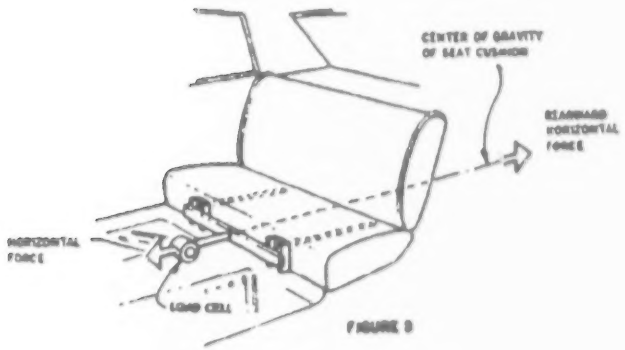


FIGURE 3

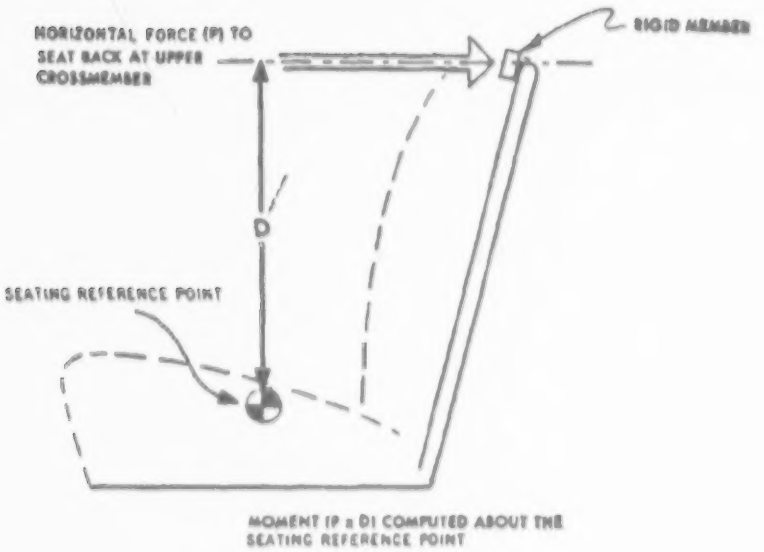


FIGURE 4

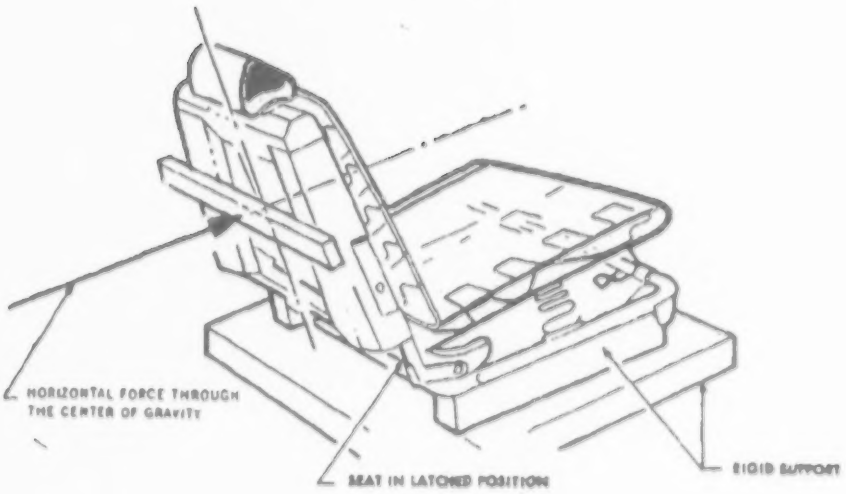


FIGURE 5

[52 FR 7868, March 13, 1987; 53 FR 30434, Aug. 12, 1988; 59 FR 37167, July 21, 1994; 60 FR 13647, March 14, 1995; 63 FR 28935, May 27, 1998; 73 FR 62779, Oct. 21, 2008]

SOURCE: 36 FR 22902, Dec. 2, 1971; 50 FR 21056, June 6, 1985; 51 FR 9456, March 19, 1986; 59 FR 37175, July 21, 1994; 59 FR 38940, Aug. 1, 1994; 60 FR 58524, Nov. 28, 1995; 64 FR 10815, March 5, 1999; 64 FR 47582, Aug. 31, 1999, unless otherwise noted.

AUTHORITY: 49 U.S.C. 322, 30111, 30115, 30166 and 30177; delegation of authority at 49 CFR 1.50.

## APPENDIX C

### 49 U.S.C. § 30102

**Title 49: Transportation**

**CHAPTER 301 – MOTOR VEHICLE SAFETY**

**Subchapter I – General**

**§ 30102 – Definitions**

(a) General definitions. – In this chapter –

* * *

(9) "motor vehicle safety standard" means a minimum standard for motor vehicle or motor vehicle equipment performance.

## APPENDIX D

**Tenn. Code Ann. § 29-28-104**

**Title 49: Remedies and Special Proceedings**

**CHAPTER 28 –**
**PRODUCT LIABILITY ACTIONS**

**§ 29-28-104 – Government standard; compliance; presumptions**

Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

## APPENDIX E

**Tenn. Code Ann. § 39-13-215**

**Title 39: Criminal Offenses**

**CHAPTER 13 - OFFENSES AGAINST PERSON**

**Part 2 - Criminal Homicide**

**§ 39-13-215 - Reckless homicide**

(a) Reckless homicide is a reckless killing of another.

(b) Reckless homicide is a Class D felony.

## APPENDIX F

**IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE**

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; RACHEL SPARKMAN, individually, Plaintiffs

v.

DAIMLERCHRYSLER CORPORATION, and LOUIS A. STOCKELL, JR., Defendants

NO. 02C-1288

**DEFENDANT DAMLERCHRYSLER CORPORATION'S PROPOSED JURY INSTRUCTIONS ON PUNITIVE DAMAGES**

Joy Burns # 019180
Lawrence A. Sutter #021353
Sutter O'Connell Mannion & Farchione
217 Second Avenue South
Franklin, TN 37064
(615) 791-1031

* * *

No. 22

In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiff in this case. Any individuals other than the plaintiff who might claim to have been harmed by DaimlerChrysler have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiff in this lawsuit.*

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* *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant. . . . Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 376-77 (ED. Pa. 1982) ("Each tort committed by the defendant is individual and peculiar to that particular plaintiff who has brought suit. Punitive damages are a recoverable item of relief so long as the conduct exhibited by the defendant with respect to that individual plaintiff can be termed as 'outrageous' and a reckless indifference to the rights of that plaintiff."). *See also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 639-40 (10th Cir. 1996) ("In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not to others."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) ("The legal difficulties engendered by claims for punitive

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damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of 'imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.' . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

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